No. 12405

In the United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

ROTHSCHILD - INTERNATIONAL STEVEDORING COMPANY, a corporation,

Appellee.

Appeal from the United States District Court
Western District of Washington,
Northern Division

BRIEF OF APPELLANT

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United States Attorney
Bogle, Bogle & Gates,
Edw. S. Franklin,
(Of Counsel)

Proctors for Appellant

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STATEMENT DISCLOSING JURISDICTION

This is an appeal from a decree of the United States District Court for the Western District of Washington, Northern Division, sitting in admiralty. The action was instituted by the filing of a libel in personam by Alfred L. Dillon, a stevedore employed by Rothschild-International Stevedoring Company, a corporation, against the United States of America as respondent, seeking recovery of damages in the amount of $50,000.00 for personal injuries sustained on the government operated vessel, SS "GOUCHER VICTORY."

(Aps. 2) The United States impleaded Rothschild-International Stevedoring Company, a corporation, as third party respondent pursuant to Admiralty Rule 56, seeking recovery of full indemnity or contribution in the event the United States were held liable to libelant for damages.

The trial court entered a decree against the United States and in favor of libelant in the amount of $7,-500.00. (Aps. 24) Although the trial court found libelant's injuries were due to a slipping of the winches at No. 1 hatch, which condition existed long enough to charge both the United States and Rothschild-International Stevedoring Company with knowledge of the defective condition, (Aps. 20-21) it dismissed the third party petition of the United States against Rothschild, (Aps. 25) from which provision of the decree the United States prosecutes this appeal. Rothschild-International Stevedoring Company, third party respondent, has not cross-appealed. The United States has paid libelant the amount of damages awarded in his favor by the decree.

This action of a maritime nature is governed by the Longshoremen's and Harbor Workers' Act, (33 U. S.-C. A. § 933) and by the Suits in Admiralty Act, (46 U. S. C. A. § 742 et seq.). It was properly brought in the District Court (46 U. S. C. A. § 742). From a final decree denying the United States recovery against Rothschild, impleaded third party respondent, an appeal lies to this court. (New Title 28, § 1293, § 2107).

STATEMENT OF THE CASE

Shortly prior to libelant's injury the SS "GOUCHER VICTORY" was drydocked in Seattle, Washington for repairs. Upon completion, the vessel docked at the Seattle Army Port of Embarkation on May 10, 1946 to load supplies and troops for a trip to Japan. The vessel was equipped with electric winches (Aps. 171, 172)

Rothschild-International Stevedoring Company, a corporation, stevedored the vessel for the government under the standard cost-plus Warshipsteve contract. (Respondent's Exhibit A-2, Aps. 205-250). It began its loading operations at No. 1 hatch on May 11, 1946. (Aps. 173) No work was done Sunday, May 12, 1946. Stevedoring was resumed Monday, May 13, 1946, the day of libelant's injury.

Libelant went to work on the night shift at 6:30 p. m. under the general supervision of Petri, Rothschild's foreman. The only ship's personnel on duty that night were Night Mate Louis Ness (Aps. 121) and Assistant Electrician Palmer. It was the latter's duty to assist in keeping the winches in working order. (Aps. 137)

Libelant's injury occurred about 9:30 P. M. in No. 1 hatch tween deck where he had been employed all evening. The lower court found it happened as follows:

> "That on or about the 13th day of May, 1946, at about the hour of 9:30 p. m., the libelant, Alfred L. Dillon, while in the course of his employment, was standing in the tween decks of the No. 1 Hold and

was in the act of guiding a strong-back into the slot provided as a resting place for said strong-back on the port coaming of said deck, and that while using due care and caution on libelant's part, the said strong-back suddenly and without warning fell and caught libelant's right hand injuring it as hereinafter more fully set out." (Aps. 20).

EVIDENCE AS TO DURATION OF SLIPPING OF WINCHES

Libelant testified that prior to his accident the winches in No. 1 hatch had slipped "quite a few loads" (Aps. 70) and he had called up to the stevedores on deck to get somebody to fix them. (Aps. 70)

Rigney, Rothschild's winch driver, testified when he first went to work that night, as was the usual custom, he tested the winches and found them satisfactory. (Aps. 97) He first noticed the winches slipping at 7:30 p. m. and claims he reported their defective condition to Sellman, the hatch tender, and expected Sellman would report it to Petri, Rothschild's foreman. (Aps. 98) Rigney testified that a man whom he vaguely thought was a member of the ship's crew "came round and tinkered with the winches." (Aps. 98)

Rigney stated that the winches next slipped at 8:40 p. m. and he again reported their defective condition to Sellman. (Aps. 99) He stated after the second episode, a crew member "merely looked at the winches." (Aps. 100) After libelant's accident, Rigney testified the winches were stopped and adjusted but the slipping condition continued for the balance of the night. (Aps. 113)

Sellman, Rothschild's hatch tender, testified the winches slipped the previous trip of the "GOUCHER VICTORY" and he had then reported the matter to the ship's electrician. (Aps. 107) He states he operated the winches prior to libelant's accident and warned Rigney that the port winch was defective. (Aps. 108, 109)

Sellman admitted that as hatch tender he was in charge of the stevedores under Petri, Rothschild's foreman. (Aps. 111) Although admittedly aware of the defective condition of the winches on the previous voyage of the "GOUCHER VICTORY," he confessed he made no special test or inspection of the winches before sending the stevedores to work in No. 1 hatch. (Aps. 111)

Sellman stated that the winches slipped at No. 1 hatch a dozen times that night before libelant's injury. (Aps. 112) His indifferent attitude as a Rothschild supervisor toward the safety of libelant and the other stevedores under his immediate supervision is reflected by the following excerpts from his testimony:

"Q. Was it a matter of any importance to you?

"A. Not an awful lot, as long as it didn't spill any loads or land a load on anybody." (Aps. 112)

* * *

"Q. Wouldn't you if you felt it was dangerous or hazardous?

"A. I tried it the previous trips and didn't get any results. I know on these Army ships, it is no use." (Aps. 112)

* * *

"Q. As a matter of fact, as a member of the Longshoreman's Union, you have a contract that you are not permitted or required to work under unsafe conditions?

"A. That's right.

"Q. If you find winches are unsatisfactory or unsafe, you close the job down until they are repaired?

"A. Well, not unless they are awful bad. Otherwise, we would be going home pretty early pretty often." (Aps. 113)

Sellman admitted he did not report the defective condition of the winches to any of the ship's personnel or his foreman, Petri.

"Q. But you yourself in charge of the gang made no complaint either to Mr. Petri or to any of the ship's officers about the alleged condition of this winch?

"A. I don't think I did that night. I don't remember of it, anyway." (Aps. 113)

Petri, Rothschild's foreman, did not recall if the winches were tested before use that night. (Aps. 185) Neither Rigney, Sellman nor anyone else reported any slipping of the winches to him before libelant's accident, nor did he observe any defect in their operation. Had he been warned of the defective condition of the winches at No. 1 hatch, Petri stated he would have called the electrician aboard the vessel to adjust the defects. (Aps. 186) Petri defined his obligation as foreman to Rothschild's employees in the presence of defective winches as follows:

"Q. If those winches had been unsatisfactory at any time or unsafe or defective, what would you have done as foreman for Rothschild Stevedoring Company?

"A. I would have reported it, went to the First Mate or the electrician on the ship.

"Q. And if they could not have been repaired satisfactorily, what would you have done?

"A. We wouldn't operate them.

Mr. Franklin: That is all." (Aps. 197)

TESTIMONY OF GOVERNMENT WITNESSES

Chief Mate Bauer and Chief Electrician Steele, who left the vessel at 5:00 p. m. the night of libelant's injury, observed the operation of the winches at No. 1 hatch that day and they operated normally. (Aps. 174-Aps. 147)

Night Mate Ness was on duty the night of libelant's injury, as was Assistant Electrician Palmer, the latter for the express purpose of servicing the winches. Both testified no complaints were made to them of any defective condition of the electric winches. (Aps. 174-Aps. 138, 139)

LOWER COURT'S FINDINGS OF FACT

Despite this evidence, the lower court entered the following findings of fact:

VI.

"That the said injuries to libelant were proximately caused by the unseaworthiness of the said

ship, and by the passive negligence of the Rothschild-International Stevedoring Co., in that the winches at the hatch where the libelant was working and in operation in connection with the job being done had defective and insufficient equipment, namely, brakes which did slip, and that such slipping of the brakes did proximately cause a sudden lowering of said strong-back and the resulting crushing of the little finger on libelant's right hand and the finger next to that little finger, and also the tendons of the said fingers and the flesh and tissues of the said fingers.

VII.

"That the winch brakes in question had been in that unseaworthy insufficient condition for some time, long enough for the respondent, United States of America, to have discovered it and had time to have remedied it and repaired the said defect, and for a time long enough for the Third Party Respondent, Rothschild-International Stevedoring Co. to have, by reasonable inspection, ascertained and given attention to such unseaworthy and insufficient condition." (Aps. 20-21)

The lower court in its decree dismissed the government's impleading petition against Rothschild for indemnity or contribution. (Aps. 23)

SPECIFICATION OF ERROR

The District Court erred:

1. In refusing to grant petitioner and respondent United States of America recovery over either by way of full indemnity or contribution against Rothschild-International Stevedoring Company, a corporation, third party respondent, for the amount of judgment and costs decreed against respondent and petitioner in favor of libelant Alfred L. Dillon.

2. In entering Findings of Fact and Conclusions of Law and decreeing that third party respondent Rothschild-International Stevedoring Company, a corporation, was entitled to its costs against petitioner and respondent United States of America. (Aps. 28-29)

PRELIMINARY STATEMENT

Both Assignments of Error raise a single question, namely the error of the lower court in refusing to grant appellant, United States, indemnity or contribution against Rothschild. The assignments will be argued together.

An appeal from the decree of the trial admiralty Judge to the Circuit Court of Appeals is a trial de novo. *Brooklyn District Eastern Terminal v. United States,* 287 U. S. 170, 77 L. ed. 240.

STATUS OF LOWER COURT'S FINDINGS OF FACT

In this case the lower court heard evidence both orally and by deposition during the trial of the case. The weight to be accorded such findings were stated by this court in the case of *United States v. Lubinski*, 153 F. (2d) 1013, as follows:

> "As in the case of *Matson Navigation Company v. Pope & Talbot, Inc.*, 9 CCA, 1945, 149 F. (2d) 295, the testimony was partly oral and partly by deposition, and, as we hear the case de novo, we give weight to the findings of the trial court as our judicial discretion dictates."

Moreover, findings concerning negligence such as are here in question are not findings of fact in the true sense so as to be binding unless clearly erroneous. They are mere factual conclusions respecting a standard of conduct and are reviewable as a matter of law.

Great Atlantic & Pacific Tea Co. v. Brasileiro, (2 CCA) 159 F. (2d) 661.

Hutchinson v. Dickie, (6 CCA) 162 F. (2d) 103.

Barbarino v. Stanhope SS Co., 151 F. (2d) 553.

ARGUMENT

I.

THE PROXIMATE CAUSE OF THE ACCIDENT WAS ROTHSCHILD'S NEGLIGENCE IN PERMITTING ITS MEN TO WORK WITH DEFECTIVE WINCHES.

The findings of the lower court that the defective condition of the winches was known to the United States prior to Dillon's injury in sufficient time to remedy the defects and that Rothschild's reckless and negligent conduct in requiring its employees to work with full knowledge of the defective condition of the winches amounted to only passive negligence on Rothschild's part have no support either in the evidence or law.

The testimony establishes indisputably that the defective condition of No. 1 winch was not known either to Night Mate Ness or Assistant Electrician Palmer, employees of the United States and on duty the night

of the accident. The testimony of Chief Mate Bauer and Chief Electrician Steele establishes that the vessel's winches at No. 1 hatch functioned perfectly both before and after Dillon's injury and were given reasonable inspection.

The testimony further conclusively shows that the defective condition of the winches was observed by Rigney, the winch driver, about 7:30 p. m., two hours before Dillon's accident, and Rigney claims he reported the matter to his supervisor, Sellman, the hatch tender, and expected him to notify the necessary parties to make the needed repairs.

Sellman, Rothschild's supervisor and hatch tender, was extremely derelict in his duty. With the claimed knowledge of the previous defective condition of these winches on the prior voyage of the SS "GOUCHER VICTORY," he made no detailed inspection of the winches when the gang went to work the night of Dillon's injury. After observing the winches slip a "dozen times" prior to Dillon's injury imperiling the safety of the stevedores in the hatch, Sellman not only failed to order the men to stop working until the winch defects had been repaired (which conduct common sense and prudence demanded) but further failed to report the dangerous condition of the winches before Dillon's injury either to Petri, Rothschild's foreman, or to Night Mate Ness or Assistant Electrician Palmer, so the defects could be remedied. This callous and recklessly negligent conduct of Sellman, Rothschild's supervisor

and hatch tender, in needlessly exposing Dillon and the other stevedores to the hazards of a defective winch for over three and one-half hours was the active and proximate cause of Dillon's accident. As Petri testified, ordinary safe practices would dictate that defective winches be stopped until repaired. Sellman admitted under the stevedore Union contract, stevedores are not permitted to work in unsafe surroundings.

II.
LIABILITY OF THE UNITED STATES

The United States as shipowner was under a nondelegable duty to furnish Dillon, a stevedore, a seaworthy ship and a safe place in which to work. *Seas Shipping Co. v. Sieracki,* (1946) 328 U. S. 85. This obligation it unknowingly breached.

This court said in the recent case of *United States v Arrow Stevedoring Company,* (9 CCA) 175 F. (2d) 329,

> "It is not questioned that though the unseaworthy condition arising from the negligent use of the hatch cover was not caused by the government's fault, it is nevertheless liable."

The liability of the United States to the stevedore is akin to that of an insurer.

III.
ROTHSCHILD'S CONTRACTUAL LIABILITY

Rothschild specifically stipulated under the terms of the Warshipsteve contract that it would perform its contract with the United States "in accordance with the

best operating practices, to exercise due diligence to protect and safeguard the interests of the Administrator (United States War Shipping Administration) in all respects and to avoid any delay, loss or damage whatsoever to the Administrator." (Part 1, Clause 1) (Aps. 202)

Thus, Rothschild undertook to stevedore the vessel properly and safely without any aid or assistance from government personnel. It obligated itself not to heedlessly and recklessly expose its employees to the hazards of defective winches. By its contract, it took over completely the performance of the stevedoring work on the "GOUCHER VICTORY" under the legal duty of exercising a high degree of professional skill and competence. This obligation Rothschild breached by permitting its employees to continue working in the immediate vicinity of winches which Rothschild (and not the United States) knew were defective and likely to cause injury. Obviously, the United States had no reason to believe that Rothschild, an old and well established stevedore, would heedlessly expose its employees to danger in performing its contract with the government.

It is well established that the stevedore contractor owes a duty to inspect the ship's appliances in order to ascertain whether or not they are in safe condition for the stevedores to use them. *Vanderlinden v. Lorentzen,* (2 CCA) 139 F. (2d) 995. *Grillo v. Royal Norwegian Government,* (2 CCA) 139 F. (2d) 237.

This court in *United States v. Wallace,* (9 CCA) 18 F. (2d) 20, stated:

> "In going on the ship to do the work, and in using its tackle, the contractor had to take them as he found them. Upon it rested the primary duty to its servants to make proper inspection to see that both places and instrumentalities were reasonably safe."

When inspection established the winches were defective, work should have been stopped for repairs, and the men withdrawn from an area of danger. The United States was under no duty to inspect the winches while Rothschild was using them. This was Rothschild's duty.

In *Seaboard Stevedoring Corp. v. Sagadahoc Steamship Co.,* (9 CCA) 32 F. (2d) 886, this court said:

> "We are aware of no rule under which the ship's officer's should be required for appellant's (stevedore's) benefit to exercise a high degree of vigilance to see that it performs a plain duty."

As the court observes in *Cornec v. Baltimore & O. RR. Co.,* (4 CCA) 48 F. (2d) 497, the stevedore owes the vessel and her owners the duty of using due care; the latter owes no such duty to the stevedore.

It is thus established that Rothschild owed the United States a contractual duty to exercise due care not to expose its stevedores to dangerous working conditions, which obligation it breached by permitting Dillon to work with a defective winch.

IV.

THE FAILURE OF THE UNITED STATES TO MAINTAIN A SEAWORTHY WINCH WAS NOT THE PROXIMATE CAUSE OF THE ACCIDENT

In permitting its employees to work in the hatch with knowledge of the defective winches (not shared in by the United States) there can be no doubt that such negligent conduct by Rothschild was the active, sole and intervening proximate cause of Dillon's injury.

The principle involved is elementary. In *Restatement of Torts,* Section 441, it is stated:

> "(2) The cases in which the effect of the operation of an intervening force may be important in determining whether the negligent actor is liable for another's harm are usually, but not exclusively, cases in which the actor's negligence has created a situation harmless unless something further occurs, but capable of being made dangerous by the operation of some new force and in which the intervening force makes a potentially dangerous situation injurious. In such cases the actors' negligence is often called passive negligence, while the third person's negligence, which sets the intervening force in active operation, is called active negligence."

The cases supporting this clause of the *Restatement* are legion. One of the most famous admiralty cases of this character is *The Mars,* (S.D. N.Y. 1914) 9 F. (2d) 183, a decision by Judge Learned Hand, who said of a similar cases where the dominant cause was the superseding negligence of the party seeking to charge the other with liability:

> "It may be thought that this was a proper case for dividing damages. * * * I think not. I take it

> that the distinction there is this: Where two joint wrongdoers contribute simultaneously to an injury, then they share the damages; but where one of the wrongdoers completes his wrong, and the subsequent damages are due to an independent act of negligence, which supervenes in time, and which has as its basis a condition which has resulted from this first act of negligence, in that case they do not share; but in that case we say that the consequences of the first act of negligence did not include the consequences of the second."

That has been the rule in several admiralty cases.

The Egyptian (1910), A. C. 400.

Compare, *The Redwood* (9 CCA, 1936), 81 F. (2d) 680, where this court denied recovery for a total loss of a vessel injured in collision on the ground that the proximate cause of the loss was the attempt of the libelant to tow his boat to port rather than to beach her in safety.

V.

THE ARROW CASE

This court has recently held in *United States v. Arrow Stevedoring Company*, supra, that almost identical conduct by the sevedore to that of Rothschild's at bar was the proximate cause of a stevedoring injury. In that case this court held Arrow, the stevedore, was wantonly negligent in permitting its employees to work in the vicinity of an improperly secured hatch cover. The court said:

> "Arrow (stevedore) owed the duty to see that none of its stevedores should work under it until the danger known to exist was removed."

The court further said:

> "On the facts we find that the sole proximate cause of the injury to Williams was the negligence of Arrow in its use of the door which otherwise could have been made secure in the usual manner described by Arrow's Larsen. Seaboard Stevedoring Company v. Sagadahoc SS Co., 32 F. (2d) 886, Bethlehem Shipbuilding Co. v. Joseph Gutradt Co. 10 F. (2d) 769, 771 (Cir. 9); The Mars, 8 F. (2d) 193, 184. Learned Hand, D. J."

In the *Arrow* case, this court reversed findings of the District Court exculpating the stevedore from a charge of negligence. Applying the *Arrow* rule to the facts of the case at bar, the findings of the lower court are obviously erroneous in failing to find Rothschild's negligent conduct in permitting Dillon to work with knowledge of the defective winches, the active and proximate cause of Dillon's injury.

VI.

THE UNITED STATES IS ENTITLED TO RECOVERY OVER FROM ROTHSCHILD OF THE FULL AMOUNT OF THE JUDGMENT IN FAVOR OF LIBELANT

Rothschild's contractual duty to the United States to stevedore the vessel in a proper and workmanlike manner was breached when Dillon and other stevedores were permitted to work in the No. 1 hatch in close proximity to the slipping and defective winch, which fact was fully known to Rothschild and unknown by the United States. The United States is therefore entitled to full indemnification from Rothschild under well established principles of law, for the full damage it sus-

tained, despite the initial breach by the United States of its non-delegable duty to Dillon to furnish him with a safe place in which to work.

The United States' right to recovery over of full indemnity and contribution from Rothschild is implied in the law in its favor by reason of employing Rothschild to perform services requiring specialized skill and the subsequent negligence of Rothschild's employees imposing loss or damage upon the United States. *Dunn v. Uvalde Asphalt Paving Co.*, 175 N. Y. 214, 67 N. E. 39; *George A. Fuller Co. v. Otis Elevator Co.*, 245 U. S. 489; *Restatement of Restitution*, Sec. 95, 97.

A similar right is implied whenever one has undertaken to protect the interests of another and negligently fails to do so. *Washington Gas Light Co. v. District of Columbia*, 161, U. S. 316.

This rule has been applied in the following admiralty cases:

Seaboard Stevedoring Corp. v. Sagadahoc SS Co., (9th Cir., 1929), 32 F. (2d) 886.

Bethlehem Shipbuilding Corp. v. Joseph Gutradt Co. (9th Cir., 1926), 10 F. (2d) 769, 771.

The Lewis Luckenbach (2nd Cir., 1913), 207 Fed. 66.

Pan-American Petroleum T. Co. v. Robins Dry Dock & R. Co. (2nd Cir., 1922), 281 Fed. 97, 108, certiorari denied 259 U. S. 586.

Standard Oil Co. v. Robins Dry Dock & R. Co. (2nd Cir., 1929), aff'g 25 F. (2d) 339.

Guy v. Donald (4th Cir., 1907), 157 Fed. 527, 530.

In the recent admiralty case of *Rich v. United States,* (2 CCA) 177 F. (2d) 688, this duty of the stevedore to indemnify the United States in a situation comparable to the case at bar was again recognized. The government's right to implead the contractor for indemnification purposes for its negligence was sanctioned. The court said:

> "If it should turn out that the libelant's injuries were primarily caused by the negligence of his employer in fastening the ladder insecurely for this use, the United States would have a cause of action against the employer based upon the latter's independent duty to indemnify it for any loss sustained by the libelant's election to sue it for injuries. * * *"

The right of the United States to recovery over against Rothschild is essentially based upon the fact that Rothschild had the last clear chance by simply performing its professional duty of due care to avoid causing injury to Dillon and thereby imposing loss upon the United States.

Otis Elevator Co. v. Maryland Casualty Co., (1934) 95 Colo. 99, 33 P. (2d) 974, 977.

Colorado & Southern Ry Co. v. Western L. & P. Co., (1923) 73 Colo. 107, 214 Pac. 30.

Parrish v. De Remer, (1947) 117 Colo. 256, 187 P. (2d) 597, 607.

Nashua Iron & Steel Co. v. Worchester & Nashua RR. Co., (1882) 62 N. H. 159.

Missouri K. & T .Ry. Co. v. Missouri Pacific Ry. Co., (1918) 102 Kans. 1, 175, Pac. 97.

Minneapolis Mill Co. v. Wheeler, (1883) 31 Minn. 121, 16 N. W. 698, 699.

Knippenberg v. Lord & Taylor, (1920) 193 App. Div. 753, 184 N. Y. S. 785, 788.

Hudson Valley Ry. Co. v. Mechanicsville E. L. & Gas Co., (1917) 180 App. Div. 86, 167 N. Y. S. 428.

Brooklyn v. Brooklyn City RR. Co., (1872) 47 N. Y. 475, 486.

Eastern Texas El. Co. v. Joiner, (Tex. Civ. App., 1930) 27 S. W. (2d) 917, 918.

Carson v. Knight, (Tex. Civ. App., 1926) 284 S. W. 617, 619.

Austin El. Ry. Co. v. Faust, (Tex. Civ. App., 1911) 133 S. W. 449, 453-454.

Restatement of Restitution, § 95, 97.

We respectfully submit that even if the United States and Rothschild were both guilty of mutual negligence, the United States is entitled to full recovery over of indemnity and contribution from Rothschild under the facts of this case and the decree of the lower court exonerating Rothschild should be reversed.

VII.

EVEN IF FAULT ON THE PART OF THE SHIP COULD BE HELD TO HAVE CONTRIBUTED TO THE ACCIDENT, THE UNITED STATES IS ENTITLED TO PARTIAL RECOVERY OVER.

In the event that the court should find that the negligence of Rothschild's employees was not a supervening, active or dominant cause of Dillon's injury, but the fault of the ship equally operated to cause the injury, the United States would be entitled to partial recovery over from Rothschild under the federal maritime law.

The best formulation of the federal maritime law on the point is contained in the case of *The Tampico,* (W. D. N. Y., 1942), 45 F. Supp. 174. There a longshoreman sued a barge owner for injuries caused jointly by the defective condition of the barge and the negligence of his fellow employees. Libelant was held entitled to recover the full amount of his damages from the barge owner and the barge owner, having been found equally at fault, was in turn allowed recovery over to the extent of one-half against the libelant's employer. The court said (pp. 175-176):

> "The libelant being free from fault is entitled to recover from Hedger, who by its negligence contributed to libelant's injuries, to the full extent of his damages. The Hamilton, 207 U. S. 398, 406, 28 S. Ct. 133, 52 L. Ed. 264; The Atlas, 93 U. S. 302, 23 L. Ed. 863. Nicholson's liability to Hedger must be decided in accordance with the admiralty principle of the right to contribution between wrongdoers. Analogies attempted to be drawn from other sources are without persuasive force. 'The rule of the common law, even, that there is no contribution between wrongdoers, is subject to exception. (Citation.) Whatever its origin, the admiralty rule in this country is well known to be the other way. (Citations.) * * *.' Erie R. R. Co. v. Erie Transportation Co., 204 U. S. 220, 225, 27 S. Ct. 246, 247, 51 L. Ed. 450. Nicholson having secured the payment to its employees of compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C.A. § 901 et seq., is immune from suits for damages resulting from libelant's injuries brought by the libelant or anyone in his right, according to the provision of Section 905 of the Act. But the right in admiralty to contribution between wrongdoers does not stand on subrogation but arises directly from the tort. Erie R. R. Co. v.

> Erie Transportation Co., supra, 204 U. S. page 226, 27 S. Ct. 246, 51 L. Ed. 450. The immunity given Nicholson by the statute from suits arising out of libelant's injuries furnishes no defense against Hedger's claim to contribution as between joint tort feasors. Briggs v. Day, D. C., 21 F. 727, 730. In reason and principle decisions in collision cases, where under the Harter Act, 46 U.S.C.A. § 192, the owner of a seaworthy vessel is relieved of liability to its own cargo, seem to point the way for upholding the right to contribution in the instant case. See Aktieselskabet Cuzco v. The Sucarseco, et al., 294 U. S. 394, 400, 55 S. Ct. 467, 79 L. Ed. 942, and cases cited."

Again, *Barbarino v. Stanhope* (2 CCA 1945), 151 F. (2d) 553, reversed a District Court decree dismissing the petition impleading a stevedore in a case where a longshoreman was injured because of a defective bolt and the shipowner sought to hold the stevedore for the negligence of its foreman in permitting libelant to expose himself to the dangerous condition. There, unlike here, the defective condition was unknown by the stevedore's foreman, yet the court recognized that liability over would exist, for the court said: (p. 555)

> "It was possible to avoid all danger at that time by merely warning the men to get out of the way. It is true that it was most uncommon for a boom to fall; but it was not unknown, and it would not have delayed the work for more than a few seconds to give the necessary warning and to see that it was obeyed. Considering that if it did fall, the men would be most gravely injured or killed, we cannot excuse the failure to protect them by so simple a means."

Where the fault of both parties contributed to an injury, the law applicable to a maritime transaction of

the United States limits such indemnity to proportionate contribution. *American Stevedores v. Porello,* 330 U. S. 446; *Portel v. United States* (S. D. N. Y.) 1949 A. M. C. 487; *Stokes v United States,* (2 CCA) 144 F. (2d) 82.

Upon the basis of comparative negligence the degree of fault apportioned to the United States should be nominal. The United States technically breached its warranty of seaworthiness to Dillon. It had no knowledge of the defective condition of the winch at No. 1 hatch, either before or after Dillon's injuries. This knowledge was possessed solely by Rothschild, who failed to warn its employees of the dangers involved or stop the hatches for repairs or notify the ship's personnel of the necessity of making such repairs, but in total disregard of its contractual obligation to stevedore the "GOUCHER VICTORY" with professional skill and care, negligently and wantonly permitted Dillon and his fellow employees to work in the vicinity of defective winches for a period of three and one-half hours until Dillon was injured.

Such reckless and negligent conduct on the part of Rothschild calls for the maximum apportionment of fault to it for the responsibility of Dillon's accident.

For the foregoing reasons, we respectfully ask this court to reverse the findings of fact, conclusions of law

and decree of the trial court and to grant the United States full indemnity over or contribution against appellee Rothschild-International Stevedoring Company.

Respectfully submitted,

J. Charles Dennis,
United States Attorney

Bogle, Bogle & Gates,

Edw. S. Franklin,
(Of Counsel)

Proctors for Appellant.